SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-130

MOTORISTS MUTUAL INSURANCE COMPANY, *Petitioner,*
v.
TERESA SIMPSON, Administratrix of the Estate of Raymond K. Simpson, deceased, and RANIA SIMPSON, GARY SIMPSON, and JO ANN SIMPSON, by their next friend, Frances Benoit, *Respondents.*

RESPONDENT SIMPSON'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

It should take little time to deny this Petition for Certiorari. The "Rule of Two" calls for peremptory denial whenever the findings of the District Court have been *affirmed* by the Court of Appeals. That rule applies in this case, and it has been called "a seasoned and wise rule of this Court" on many occasions and without deviation.

The Rule of Two is buttressed in this case by the decision of an unanimous Court of Appeals, a decision in which one judge took the time to write a concise and brilliant concurring opinion (page 9a of Appendix to Petition).

The Rule of Two is buttressed by denial of a rehearing (page 13a of Appendix to Petition).

The Rule of Two is solidified by denial of an *en banc* hearing where "no judge in regular active service" on the Court of Appeals even requested "that a vote be taken on the suggestion for an *en banc* rehearing". (Page 15a of Appendix to Petition)

Furthermore, Petitioner has failed to comply with the Supreme Court Rules governing certiorari in the following:

1. The Petition for Certiorari fails to obey Rule 23(a) and (i) in that there is *not* appended to the petition a copy of "any opinions delivered upon the rendering of the judgment . . . sought to be reviewed, including *all* opinions . . . in the case". The *final opinion* of the Court of Appeals is referred to at page 1 of the Petition for Certiorari by citation at 494 F.2d 850 but is not appended. Surely this is not a compliance with the mandatory Rule 23(a) and 23(i) and failure to append a copy of the final opinion must at once be sufficient ground for peremptory denial of the Petition because Rule 23(4) provides:

> "The failure of a petitioner to present with accuracy . . . whatever is essential to a ready and accurate understanding of the points requiring consideration *will be a sufficient reason for denying his petition.*"

OPINIONS BELOW

Motorists fails to attach to its Petition a copy of the *official* opinion of the Court of Appeals. Instead, Motorists attaches as its Appendix A the slip opinion in an effort to exploit an ambiguity which was removed by the Court of Appeals before publication of its official opinion. Certiorari cannot be granted to an opinion which is not the official opinion and Motorists failed to set it out in its Petition. The "Memorandum of Opinion and Judgment of the District Court for the Northern District of Indiana" also may not be considered as an "Opinion Below." It is a piece of void philosophy by a District Judge in an abortive piece of litigation instituted by Motorists and nullified by the Seventh Circuit before the case at bar was ever filed. Comparisons of the record in that case with the record in this case reveal clearly that many different facts were involved in the case at bar, contrary to Motorists' assertion on page 2 of its Petition.

JURISDICTION

Simpson agrees that this Court has jurisdiction under 28 U.S.C. 1254(1) to determine whether Motorists has advanced any valid grounds for granting of a writ of certiorari.

QUESTIONS PRESENTED

Simpson contends that Motorists' statement of the "Question Presented" fails to present any ground for certiorari under 1254(1) or Rule 19.

Motorists' description of "circumstances", divided into three numbered paragraphs, are all defectively argumentative. They misstate the record as to what occurred at trial, pervert the actual findings of the

jury and of the Court of Appeals and recite as facts matters of evidence consistently rejected by the jury, the trial court and the Court of Appeals.

This action was initiated by filing a complaint in two Counts. Count I alleged that Penman was an insured under the terms of Motorists' policy and demanded judgment against Motorists for the $10,000.00 coverage plus interest on the entire tort judgment.[1] Count II charged Motorists with bad faith and demanded the balance of the tort judgment, $200,000.00. The jury returned a verdict for Simpson on both Counts, awarding $69,386.84 on Count I and $200,000.00 on Count II.

Motorists obscures the fact that judgment was rendered on two separate counts. Since Motorists' statement of "circumstances" omits reference to the issues presented under Count I, no contention has been presented for certiorari on the coverage issue and the Supreme Court must realize that Motorists has accepted the fact that Penman was indeed its insured and, therefore, entitled to the benefits of insurance coverage and to the judgment on Count I.

Furthermore, Motorists never asks this Court to reverse the lower court's decision on Count II alone, the bad faith issue, but blithely asks for reversal of the entire $270,000.00 judgment. (The judgment was actually in the amount of $269,386.84). Since Motorists has not challenged any of the matters relating to Count I, it would not be possible for this

[1] The policy clearly provides, and Motorists dare not dispute, that the basic policy coverage required it to pay interest on the *entire judgment* rather than merely on that portion of the judgment covered by the policy limitations.

Court to grant the relief Motorists apparently seeks through the matters raised in its Petition. Because Motorists fails to seek an appropriate remedy, this Court should conclude that there is no question presented for review.

STATEMENT OF THE CASE

Motorists' statement of the case constitutes a substantial departure from universally accepted rules of appellate practice. Under the guise of providing this Court with a factual background of the case, Motorists puts forth its own characterizations of the evidence, characterizations long ago rejected by the jury, the trial judge and the judges of the Seventh Circuit. It is axiomatic to Supreme Court certiorari procedure that when factual findings of the two courts below are the same, then the Supreme Court will not search the record to find or consider conflicting evidence. *Neil* v. *Biggers,* 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972); *Blau* v. *Lehman,* 368 U.S. 403, 408-409; 7 L.Ed. 2d 403, 82 S.Ct. 451, (1962); *Faulkner* v. *Gibbs,* 338 U.S. 267, 268, 94 L.Ed. 62, 70 S.Ct. 25 (1949). The facts supporting the jury's verdict on the coverage issue and the bad faith issue are clearly set forth in the Court of Appeals' opinion. Since Motorists does not challenge the sufficiency of the evidence to support the jury's verdict, repetition of these findings in the body of this brief is unnecessary. There were numerous other bad faith facts in the record not specifically noted by the Court of Appeals.

Motorists craftily blends the bulk of its arguments into its "Statement of the Case", rather than separating its arguments into clearly delineated sections. It is difficult to determine when Motorists is making

an argument purporting to show grounds for granting of this Petition or when petitioner is merely complaining about factual and legal rulings that were adverse in the Court below.[2]

Simpson will answer Motorists' three areas of complaint under separate headings.

ARGUMENT

EXCLUSION FROM EVIDENCE OF JUDGE ESCHBACH'S OPINION PROPERLY SUSTAINED AND NOT VIOLATIVE OF MINIMUM FEDERAL STANDARDS OF JUDICIAL PROCEEDINGS

Simpson filed the tort case October 25, 1965. Pre-trial conference was held June 16, 1966, and was then set for trial for December 30, 1966. Motorists had completed its investigation of the tort occurrence and had made its wrongful determination to deny coverage within a few weeks after the accident, so that it peremptorily rejected Simpson's settlement demand of December 23, 1965, the day it was received, and before Penman could have been consulted or even notified. Yet Motorists delayed initiating its declaratory judgment action until July 22, 1966, several weeks after the

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[2] Simpson was forced to try this case to a jury without the benefit of live witnesses. Motorists, which had produced Griffin and Penman at the tort trial, the declaratory judgment trial and several depositions, left these witnesses in Ohio this time. Though Simpson put before the jury considerable correspondence between Motorists and its counsel, as well as claims and investigation materials, Motorists only brought one representative to the trial (Alton Williams), and he did not testify even though he compiled some of the important evidentiary documents and apparently participated in the decision-making processes leading to the bad faith refusal to settle. Let Motorists not be heard to complain about the dearth of live testimony, since all persons who might have testified live were either petitioner's own employees or persons previously brought to Indiana from Ohio by Motorists.

tort case had been pre-tried and assigned for trial. And even then Motorists chose an improper forum and never attempted to make Penman, whose rights were primarily at issue, a party to the declaratory judgment action. Judge Eschbach properly refused to allow such a dilatory maneuver to delay Raymond Simpson's widow and children their day in court.

Unfortunately, Judge Eschbach erroneously took jurisdiction of the declaratory judgment action and then wrote a 53 page opinion erroneously concluding Penman was not an insured. Simpson appealed to the Seventh Circuit on both the jurisdictional and substantive issues. The Seventh Circuit did not need to reverse Judge Eschbach on the erroneously decided substantive issues of coverage since it ordered the case dismissed for lack of jurisdiction, thus rendering his opinion a nullity.

Motorists' assertion that it would not be subject to this judgment if the Seventh Circuit had not reversed Judge Eschbach on the jurisdiction issue is palpably erroneous. The Seventh Circuit found it unnecessary to reverse Judge Eschbach on his erroneous substantive findings. But in light of the Seventh Circuit's unanimous affirmance of Count I herein, as initially decided in Simpson's favor by a jury and experienced trial judge, Simpson is confident that Judge Eschbach would have been reversed on the substantive issues even if his court had had jurisdiction, and Motorists would be facing the consequences of its tortious conduct just as it is now.

Judge Noland properly excluded from evidence the erroneous 53 page "Memorandum of Decision and Judgment" rendered by the Northern District in the declaratory judgment case. There should be no con-

fusion that Motorists in any way *relied* upon Judge Eschbach's opinion when Motorists engaged in its tortious conduct leading to the jury's verdict on Count II. The declaratory judgment case was tried in June of 1967, six months after the tort judgment against Penman had been rendered and eighteen months after Motorists had summarily rejected Simpson's settlement demand without consulting Penman.

Judge Eschbach's lengthy opinion was rendered a *nullity* by the Seventh Circuit's dismissal of the declaratory judgment action. Therefore, it could not be admissible as a judicial finding on any issue of the case. Further, under applicable rules of evidence, the opinion itself was inadmissible to prove any fact in the case. *Donellan, et al*, v. *Hardy*, 57 Ind. 393, (1877).

Finally, even if Judge Eschbach's *personal opinion* on the reasonableness of Motorists' denial of coverage might have had probative evidence or the bad faith issue, it was not presented in a form admissible at the trial. The document constituting Motorists' Exhibit "N" in a request for admissions is analogous to a physician's report or an engineer's study. It is *hearsay!* If Motorists wanted to avail itself of the judge's opinion as an expert on the bad faith issue, petitioner should have called him to the witness stand, attempted to qualify him as an expert, solicited his opinion by proper hypotheticals, and afforded Simpson an opportunity for cross-examination. Contrary to Motorists' assertions, it would have been violative of Simpson's fundamental rights to a trial conducted fairly in accordance with time-honored rules of evidence to permit Judge Eschbach's written opinion into evidence.

Although Simpson always has contended that the declaratory judgment action was a ruse, more indicative of bad faith than a sincere effort to resolve the cov-

erage issues, the trial court allowed Motorists to prove everything pertaining to that action except the erroneous, invalid opinion which resulted. Accordingly, Motorists was able to introduce before the jury the substance of its declaratory judgment complaint; Motorists showed the jury that it had commenced the declaratory judgment action on July 22, 1966, and that it asked that it be advanced on the calendar for a speedy hearing. The entire correspondence between Motorists and its attorneys with respect to filing a declaratory judgment action was allowed in evidence. (This correspondence was put into evidence by Simpson. Motorists objected frivolously on the basis of attorney-client privilege, objections properly brushed aside by the trial judge and the Court of Appeals.) Therefore, the jury had the entire picture of Motorists' faulty efforts to resolve the coverage issue.

Motorists never has been able to cite a single authority where the written opinion of a trial judge, reversed because that judge lacked jurisdiction over the case, has been accepted by any court as competent evidence of anything. The Seventh Circuit was correct in affirming exclusion of the evidence. Motorists does not come close to showing that exclusion of Judge Eschbach's opinion violates "minimum standards" governing the accepted and usual course of judicial proceedings of Federal appellate courts.

NO VIOLATION OF MINIMUM FEDERAL STANDARDS IN TRIAL COURT'S "BAD FAITH" INSTRUCTIONS

The trial judge found that Ohio courts recognized the bad faith standard in defining an insurer's duty toward its insured, rather than the negligence standards followed in Indiana. The instructions on bad faith given by Judge Noland are accurately set forth in Motorists' Petition at page 9. These instructions con-

form with the concept of the bad faith principle utilized by courts and legal writers everywhere, and certainly convey clearly and fairly the Ohio approach to an insurance company's duty in dealing with its insured's interests. Keeton, *Liability Insurance and Responsibility for Settlement,* 67 Har. Law Rev. 1136 (1954). It must be stressed that Motorists *never objected to these instructions on the grounds that they failed to incorporate the principal elements of bad faith* or somehow misstated Ohio law. Motorists' only objection was that the instructions presume the non-existence of a coverage question, which is a meaningless objection. Tr. II, p. 55. Therefore, Motorists waived the objection now asserted in its Petition. The Court of Appeals generously avoided upholding Judge Noland's instructions on the basis of Motorists' counsel's embarrassing failure to make any meaningful objection to the instructions, since the instructions were correct anyway. The U. S. Supreme Court does not consider alleged errors in instructions not raised in the trial court. *First Unitarian Society* v. *Faulkner* (1875), 91 U.S. 415, 23 L.Ed. 283; *Jacobs* v. *Southern Ry Co.,* (1916) 36 S. Ct. 588, 241, U.S. 229, 60 L.Ed. 970.

Motorists employs a revolting misrepresentation of the record in an effort to mislead the U. S. Supreme Court into believing that the trial court erroneously denied Motorists an instruction based on decisions of Ohio courts. On page 8 of its Petition, Motorists quotes from *Wasserman* v. *Buckeye Union Casualty Co.,* 32 O. St. 2d 69, 290 N.E.2d 836 (1972) and Motorists states:

> "*That instruction, which Motorists had requested in this action, is as follows:* 290 N.E.2d at 840:
>
> '2. A lack of good faith is the equivalent of bad faith and bad faith, although not susceptible of

> concrete definition, embraces more than bad judgment or negligence. It imports dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.' "

Motorists never submitted an instruction remotely like the *quotation* from *Wasserman* which Motorists sets up in its brief in such form as to lead the reader to think Motorists submitted an instruction which read that way. Motorists should be rebuked for this cruel attempt at deception at page 8 of its Petition.

Motorists' tendered instruction [3] contains self-serving declarations lifted from its own policy, and erroneous statements of law. The last paragraph is patently

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[3] Motorists' Instruction No. 7 (its only tendered instruction purporting to define "bad faith") reads:

"Instruction No. 7

"As to Count II, Motorists Mutual's insurance policy provided that 'the company may make such an investigation on and settlement of any claim or suit as it deems expedient.'

"I instruct you that as a matter of law applicable to this case, Motorists Mutual can be liable if at all only for bad faith but not for negligence, as to plaintiffs' claim that it should have settled the death claim by Teresa Simpson as Administratrix against Penman, even though you first find that Penman also was insured by such policy.

" 'Bad faith' is not simply bad judgment and it is not merely negligence. 'Bad faith' imports a dishonest purpose, a conscious doing of wrong, arbitrary or capricious conduct, equivalent to fraud.

"Defendant was not required to decide at its peril whether Penman was or was not insured by its policy, nor was defendant required to make that decision on the basis of what was reasonable to believe. To recover on Count II, plaintiff must prove by the greater weight of all the evidence that defendant's *disclaimer* of insurance coverage to Penman was done in bad faith." (Our italics)

erroneous in that it requires plaintiff to prove that defendant's *disclaimer of coverage* was done in bad faith in order to recover. No authority supports such a burden. The plaintiff, under Ohio law, need only prove that the insurer exercised bad faith in its conduct toward its insured, "either in negotiations respecting a settlement of the claim against the insured or in the conduct of the trial of the tort action on behalf of the insured." (quote from Wasserman and Slater, 290 N.E.2d 837, 840; 187 N.E.2d 45, 46.)

We, therefore, have a situation where Motorists' claims that "minimum standards governing accepted and usual course of judicial proceedings of federal appellate courts" have been violated must be rejected because: (1) Motorists' tendered instruction on bad faith was so erroneous that it had to be refused, and (2) the trial judge gave its own proper instruction on bad faith without any valid objection from Motorists.

EVIDENTIARY FINDING RE PENMAN'S CONDITION WHEN STATEMENT OBTAINED NOT BASIS FOR CERTIORARI

Motorists' final complaint is that the Seventh Circuit violated minimum standards of Federal appellate procedure by including in its opinion a description of one of the circumstances under which Motorists obtained a statement from Penman. The Circuit Court of Appeals is bound by the evidence and inferences therefrom that favor and support the judgment of the jury and trial court. With respect to Penman's condition when Motorists' adjuster obtained a "statement" with Penman's signature on it, the record supports the inference that Penman was sedated when the adjuster purportedly interviewed Penman. It is clear from Motorists' "Review for Trial" (prepared by Mr. Williams who attended this trial) that Motorists was in doubt as to the

legal validity of Penman's statement because no clearance could be obtained from hospital authorities that Penman was free from the influence of drugs or sedatives. The statement is dated October 6, 1965, only four days after the accident in which Penman received serious injury and Raymond Simpson was killed. The jury could properly have concluded that Penman was sedated when the statement was purportedly taken. He was certainly badly injured, hospitalized, and emotionally distraught because of the tragedy he had caused and beyond doubt was no match for the skillful claims adjuster whose mission to the hospital was to procure Penman's signature on a document that would provide a foundation for Motorists' avoidance of its responsibility for damages. Mr. Williams was present throughout the trial as Motorists' personal representative but Motorists did not see fit to place Mr. Williams on the stand and make any explanation of his statement about Penman's sedation, and, therefore, Motorists was bound to face the obvious inferences to be drawn from Williams' statement.

The Court of Appeals did not detail the other facts surrounding Motorists' conduct in procuring this statement, facts which demonstrate bad faith conclusively regardless of Penman's condition. Griffin filed a Proof of Claim form October 4, 1965, with a Mr. Tillinghast of Motorists Mutual at Cincinnati, establishing Penman's residence as 860 Glenwood, Griffin's home. (Tr. I, pp. 54-59). That same day, Mr. Tillinghast wrote his Indiana adjuster, one Merle Robinson, instructing him to see Penman in the hospital in Lafayette and get a statement from him that would produce their "policy defense". (Tr. I, p. 58) Motorists' decision already had been made to retain control over Penman by virtue of

the cooperation clause in its policy, yet leave Penman to his fate when the inevitable heavy damages were assessed. Mr. Robinson wrote out the statement and procured Penman's signature. Mr. Robinson's purposeful insertion of the sentence "My permanent address is 817 Mann Place where my mother, Albia Penman, lives", contrasts markedly with the Proof of Claim filed two days after the accident by Griffin and with Penman's own sworn testimony that he had no other residence than Griffin's at the time of the accident. (Tr. I, p. 21) Robinson's sly insertion of "I asked Sylvester if I could use his 1960 Oldsmobile to take a girl out . . ." contrasts with the sworn testimony of both Penman and Griffin that nothing was said about Penman's reason for asking for the car or his intentions for using it. (Tr. I, pp. 24, 27, 28, 30, 36, 41)

Regardless of Penman's condition at the time his statement was taken, the record is beyond dispute that Motorists and its attorneys controlled Penman throughout the litigation under the guise of defending him and thereby developed its evidence for denial of coverage as best it could through statements and depositions of Penman. There is authority that an insurer is estopped from denying coverage when it defends an insured and at the same time gathers evidence for denial of coverage. *Employers Casualty Company* v. *Tilley,* (Tex., 1973) 496 S.W.2d 552; *Pacific Indemnity Company* v. *Acel Delivery Service, Inc.,* (5th Cir., 1973) 485 F.2d 1169. (As respondent, Simpson may support the judgment below on grounds not even considered by the court below. *McGoldrick* v. *Compagnie General Transatlantique,* (1940) 60 S.Ct. 670, 309 U.S. 430, 84 L.Ed. 849.

Penman's condition at the time his statement was taken was a minor evidentiary fact in the case, hardly

a fact that the Seventh Circuit placed "heavy reliance" upon. Motorists obviously hopes to divert this court's attention from the major evidence of bad faith adduced at trial and recognized by the Court of Appeals. The fact as to Penman's condition when his statement was taken is merely a small detail in the overall pattern of bad faith, which included:

(1) Motorists knew and admitted from the very beginning that the wrongful death claim against Penman was a clear case of liability worth substantially in excess of the $10,000.00 coverage (Tr. I, pp. 59-61, 74, 78 and 90) (Only skillful defense work limited the damages to $210,000.00), yet Motorists summarily rejected Simpson's offer to settle for the policy limit of only $10,000.00 (Tr. I, pp. 45-47);

(2) Penman never was advised of his personal exposure, that Simpson would surely obtain a large judgment against him in excess of Griffin's policy limits, although Motorists investigated the claim on Penman's behalf, controlled all settlement negotiations, defended Penman and retained complete control over the litigation.

(3) Motorists, while appearing for Penman and controlling his defense, summarily rejected Simpson's settlement offer on the very day it was received without first communicating it to Penman, advising him of it, or consulting with him about his rights in any way. (Tr. I, pp. 45-47);

(4) Motorists completely avoided disclosure to Penman that such a small sum as $10,000.00 would settle the case and never advised Penman that Simpson would release him from liability for only $10,000.00. (Tr. I, pp. 23-24) Such withholding of critical infor-

mation, in and of itself, is enough to subject Motorists to excess liability. The case of *Slater* v. *Motorists Mutual Insurance Company,* 174 O. St. 148, 187 N.E.2d 45, (1962) is cited in the footnote at page 11 of Motorists' Petition, as authority to the contrary. In that case, the insurer was charged only with failure to make official disclosures of its insured's limits *to the tort claimant,* and indeed there was evidence that the tort claimant's attorneys had been advised of the policy limits. Additionally, the insurer *even offered* the policy limits. One's imagination cannot be stretched to bounds that would admit *Slater* as authority permitting Motorists to withhold policy limit information and settlement demands *from an insured,* one whose defense is undertaken and controlled by an insurer committed to elude any payment whatsoever.

(5) Motorists never advised Penman that he could seek to make his own terms with Simpson or that he could contribute to settlement. Instead, Motorists controlled *all* settlement negotiations.

(6) Motorists hid the "resident of the household" coverage from Penman. Reference to this coverage was studiously avoided in all correspondence with Penman even though Motorists knew Penman was covered as a "resident" from the day Griffin filed his Proof of Loss two days after the accident, listing Penman's address as his own. (Tr. I, pp. 54-59) The only explanation for denying him coverage that Motorists ever gave Penman was that he did not have permission to use Griffin's car. While concealing the "resident of the household" coverage from Penman, Motorists took statements from Penman, including depositions, clearly calculated to build evidence against this coverage. This conduct in and of itself was bad faith as a matter of law encom-

passing "dishonest purpose, moral obliquity, conscious wrongdoing, and breach of a known duty through an ulterior motive . . . It also embraces actual intent to mislead or deceive another."

These are ample facts to support the Court of Appeals' affirmance of Count II.

JUDGE BELL'S CONCURRING OPINION CORRECTLY RECOGNIZED THAT AS AN INSURED, PENMAN WAS DEPRIVED OF COVERAGE TO HIS DETRIMENT

Motorists incorporates several footnotes into its petition, matters not important enough to be included in the body of the petition. Simpson does not agree that the footnotes are accurate characterizations of the record, but it would take considerable pages to refute these misstatements of the record one by one. However, footnote 7 on page 13 demands reply. Judge Pell noted the obvious: Despite Motorists' disclaimer, Penman was in fact an insured under Griffin's policy. That fact has now been judicially established beyond question or recall and is admitted by Motorists. One of the benefits Griffin paid for was coverage for Penman and Penman was denied the benefits of coverage. Therefore, neither Penman nor Griffin "got what he paid for" (Motorists' words, not Judge Pell's). Since Griffin listed Penman as a resident of his household, in the statement he executed "a few days after the accident", Motorists was indeed in bad faith in contending that Penman was not an insured, since being a resident of Griffin's household clearly established Penman to be an insured.

REASONS FOR DENYING THE WRIT

Motorists' Petition should be denied because there is nothing in it to show how this case fits within the requirements of Supreme Court Rule 19. Motorists has

not contended that an important Federal question is presented, or that the Seventh Circuit's opinion conflicts or causes confusion with the decisions of this Court or any other Federal Court. Motorists' only complaint is about an instruction, an evidentiary ruling, and a statement in the Court of Appeals opinion which is not of any ultimate significance in the decision. Congress has placed normal and primary responsibility on the Court of Appeals to resolve such matters. By straining the language of Rule 19 pertaining to departure from the accepted and usual course of judicial proceedings, Motorists does not thereby elevate the matters complained of to the status of Rule 19 issues. The cases cited in the Petition are not in point. The only "bizarre coalescence of factors involved in this" case was Motorists' bad faith effort to deprive Raymond Simpson's children and widow of the $10,000.00 policy coverage when the potential liability was in excess of $200,000.00. The cases cited by Motorists do not support its petition for certiorari.

Saldana v. *United States*, 365 U.S. 646 (1961) involved a narcotics conviction set aside because of events that occurred during the course of the prosecution not detailed in the opinion except that various trial judges before whom the case was pending expressed determination to impose severe jail sentences on the accused. Even the Solicitor General suggested during oral argument before the Court that the defendant had been unfairly treated.

Gibson v. *Lockheed*, cited by Motorists, is a case where a Court of Appeals had *reversed* a tort judgment for the plaintiff. The Supreme Court was called upon to issue certiorari on the ground that the decision disclosed conflict and confusion among the circuits in the

application of Rule 51. The Supreme Court held that a critical examination of the 118 decisions supposedly in conflict disclosed that there was no such conflict and confusion. However, the Supreme Court saw that the Court of Appeals had caused an injustice to the tort victim by its *reversal* for refusal of the District Court to give 4 of Lockheed's instructions. The Supreme Court held there was no error in refusing the instructions because Lockheed had not made proper objections to the refusal and there was no prejudicial error anyway so the District Court judgment was reinstated in the interests of justice.

However, the case at bar comes under the "rule of two" pronounced in *Comstock* v. *Group of Institutional Investors* (1948), 335 U.S. 211, 68 S.Ct. 1454, 92 L.Ed. 1911:

> "The issue of fact, contested in a long hearing, are not before us for review. Petitioner assured us, in support of the petition for certiorari here, that 'there is no factual controversy before this Court' and 'we assume the findings of the District Court.' Our challenge is directed only to the import of these unchallenged facts."
>
> "Much of petitioner's argument seems to depart from these assumptions and to invite us to reach conclusions from the voluminous record in the case, contrary to those reached by the two courts below. This we cannot do. *A seasoned and wise rule of this Court makes concurrent findings of two Courts below final here in the absence of very exceptional showing of error.*" (Citing 14 cases.) (Our italics.)

This rule was followed in *Rudolph* v. *U.S.* (1962) 370 U.S. 269, 8 L.Ed. 2d 484, 82 S.Ct. 1277 reh. den. 371 U.S. 854 9 L. Ed. 93, 83 S.Ct. 15, and to this date never has been abandoned in any decision.

LaBuy v. *Howes Leather Company*, 352 U.S. 249 (1957) was a case where a district judge referred several anti-trust cases for trial before a magistrate and this court upheld issuance of a writ of mandamus to compel the trial judge to hear the cases himself. Surely none of these cases even remotely compare with this case and Motorists makes no cogent argument to show how any of the three cases it cites support its position.

At page 14 of its Petition Motorists calls the exclusion of Judge Eschbach's opinion as the "most arbitrary action of the court below". But Motorists was allowed to prove everything it desired about its imperfect efforts to create a coverage issue, including its aborted filing of the declaratory judgment action almost a year after the tort occurrence.

Motorists employs a deceiving and improper tactic: Instead of setting out the official opinion of the Seventh Circuit in its appendix as required by Rule 23(1), Motorists sets forth the slip opinion and then constructs arguments based on what was said in the slip opinion but later changed in the official opinion. When a party must resort to the slip opinion to dredge up its proclaimed most important issue, that party invites summary overruling of its petition.

It is proper for a Court of Appeal to correct an opinion by withdrawing a sentence therefrom even after the matter is pending on certiorari. *Kinnear-Weed Corp.* v. *Humble Oil* (5th Cir., 1961) 296 F.2d 215.

Motorists cites *Stevens* v. *Northwestern Nat. Cas. Co. of Milwaukee*, 305 F.2d 513, 6th Cir., 1962, and *Martin* v. *Travelers Indemnity Co.*, 450 F.2d 542, 5th Cir., 1971, for the proposition that "an insurance company is not liable for bad faith in refusing a settlement offer and insisting upon litigating the issues of liability or cov-

erage, when its position on those issues is not groundless or disingenuous". (Petition, page 14.) Simpson need not debate that proposition here, since the jury, trial judge, and Circuit Court of Appeals found Motorists to be guilty of bad faith despite the disclaimer of coverage and Motorists nowhere in its Petition challenges the sufficiency of the evidence to sustain the finding of bad faith. Neither cited opinion supports Motorists' contention that Judge Eschbach's opinion was improperly excluded. Certainly, neither supports the contention that an insurance company can cause its insured to be the victim of a tort judgment by fabricating tricky policy defenses. The *Stevens* case involved a very questionable liability situation in the tort claim and policy defenses were not involved at all. The court in *Martin* specifically held that

> "We hasten to point out that an insurer is not absolved of all responsibility to a possible insured whom it has undertaken to defend merely because the company is denying coverage." (page 552)

The facts of the *Martin* case, including the $100,000.00 limits the insurer would have had to pay to settle, are so different from the case at bar that it can provide no authority for Motorists' position where only $10,000.00 would have ended the case.[4]

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[4] The mainstream law on bad faith is that a denial of coverage, no matter how factually supported, is not a defense for failure to settle on behalf of the possible insured when good faith would otherwise require it. *Communale* v. *Traders & General Insurance Company*, 50 Cal. 2d 654, 328 P.2d 198 (1958); *Western Casualty & Surety Company* v. *Herman*, 405 F.2d 121 (1968, 8th Cir.); *Landie* v. *Century Indemnity Company*, (Mo. 1955) 390 S.W.2d 558; *Foundation Reserve Insurance Company* v. *Kelly*, 388 F.2d 528 (10th Cir., 1968). These cases make it clear that even an honest belief that coverage defenses exist do not excuse an insurance company from its duty to pay its policy limits when good faith would otherwise require it.

Motorists misstates *Wasserman* v. *Buckeye Union Casualty Company,* 32 Ohio St. 2d 69, 290 N.E.2d 837 (1972) at page 16 of its Petition. The basis of decision in that case was that Ohio does not recognize the negligence principle of excess liability but adheres to the bad faith principle. It does not at any place *require,* as claimed by Motorists, at page 16 of its Petition, that an instruction on bad faith "must state the elements of dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud". Instead, *Wasserman* merely states that an instruction containing all of the elements in paragraph two of the syllabus in *Slater* is a complete and correct statement. But at page 840 of 290 N.E.2d, 23 it can be seen that the Ohio Supreme Court surely did not require that the whole paragraph from *Slater* need be given, for the Court said:

> "Insofar as the *Slater* case sets out the essential elements of 'bad faith' as something more than mere negligence or bad judgment and implying a dishonest purpose, the charge was a correct and complete statement of the law."

In fact, the Ohio court was saying that a recitation of every alternative facet of bad faith described in *Slater* need *not* be included to constitute a correct and complete charge. The issue of just how bad faith should be explained to a jury was not dealt with in *Wasserman.* One need only read Judge Noland's instructions to see that he told the jury that more than mere negligence or bad judgment was required and that failure to settle was not determinative and that there was no duty to settle each and every claim and that all Motorists

had to show was good faith to escape liability. Judge Noland gave a clear explanation of "bad faith" stating that an insurer must give *equal consideration* to the interests of its insured. This concept of "equal consideration" is a much more meaningful and workable explanation of "bad faith" than "moral obliquity", "fraud", etc., yet it fairly encompasses the concepts that *Wasserman* cites from older Ohio cases. Surely Motorists does not contend that the "equal consideration" concept is unfair or improper. One cannot conceive of an Ohio court granting an Ohio insurance company license to sacrifice the interests of its insureds for the sake of its own. Thus, courts applying the "bad faith" theory of excess liability commonly use the "equal consideration" concept since it is the most readily understood by a jury. This concept is treated in Keeton, *Liability Insurance and Responsibility for Settlement,* 67 Harv. Law. Rev. 1136 (1954) cited at page 5 of Motorists' Petition. Indeed, many of the so-called elements of bad faith cited by Motorists from Wasserman are themselves best defined in terms of the duty to give equal consideration.

Of course, Motorists never objected to Judge Noland's "bad faith" instructions on the ground that they misstated Ohio law or didn't adequately cover it so Motorists cannot now make such a complaint. Motorists own tendered instruction was hopelessly erroneous as we have shown. The Court of Appeals properly upheld the district court on this issue.

As this Court now knows, the matter of Penman's condition when his statement was first taken never has been a fact of importance in this case. Whatever his condition, Motorists tried to beat him out of coverage

under the guise of representing his interests. Motorists cannot elevate this subsidiary fact issue to the status of "ultimate fact" (Petition, page 17) by so labelling it. There were so many hard-core indicia of bad faith in this case that Penman's condition when his statement was obtained was only cumulative.

CONCLUSION

A Federal jury, trial judge, and unanimous Circuit Court of Appeals has decided that (1) Penman was an insured under Griffin's policy, and, therefore, entitled to the benefits of coverage, and (2) that Motorists acted in bad faith in dealing with Simpson's offer to accept the policy limit in settlement of the claim against Penman. The coverage issue is not challenged in Motorists' Petition. The bad faith issue is challenged on the basis that Motorists was not accorded minimal standards of Federal judicial proceedings. The three matters Motorists complains about were properly determined by the court below. They are matters intended to be resolved by the Court below, and not this Court. Motorists has tried everything possible to delay execution of this judgment. It is time this litigation came to an end and Motorists paid.

Finally, the Supreme Court takes judicial notice of the fact that interest rates of 12% to 15% are readily obtainable by Petitioner as against the 8% running on the judgment. It is small wonder then that such groundless Petitions for Certiorari are filed. The Supreme Court should attach a penalty of 10% to stop such practices. Rule 56(2) makes provision therefor. Otherwise the Court will be swamped with groundless petitions for certiorari to take advantage of the current high interest rates.

WHEREFORE, Respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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